



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON, DC 20310-0111

April 2, 2003

MEMORANDUM FOR ACTING ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)

SUBJECT: U.S. Army Corps of Engineers

Reference:

- a. Memorandum, Office of the Assistant Secretary of the Army (Civil Works), November 25, 2002, subject: U.S. Army Corps of Engineers (USACE) Functions That Are Inherently Governmental or Otherwise Should Be Exempted from Competition.
- b. Memorandum, Office of the Assistant Secretary of the Army (Manpower And Reserve Affairs), November 1, 2002, subject: Clarification of Standards of Review – Third Wave Exemption Requests.
- c. Memorandum, COE, CECW-ZA, 12 June 2002, subject: Civil Works Functions That Should be Classified as Inherently Governmental.
- d. Memorandum, Office of the Assistant Secretary of the Army (Manpower And Reserve Affairs), January 25, 2002, subject: Determination of Inherently Governmental Activities and of Commercial Activities Exempted from Private Sector Performance.
- e. Memorandum, COE, CECC-C, 14 December 2001, subject: Government Functions and Legal Conflicts Applicable to Military Funded Engineering and Related Professional Employees of the Corps of Engineers.
- f. Memorandum, Office of the Assistant Secretary of the Army (Civil Works), 19 January 2001, subject: Commercial Activities.

Functions.

- a. Command. The uniformed military officers in the Corps of Engineers include the commanders of the MACOM and its subordinate commands, including the major subordinate commands (MSCs), districts, R&D laboratories, and other subordinate commands, plus the deputy commanding officers, executive officers, and other, select military officers serving these commanders.

- b. Management Headquarters – Civil Works, Q120.
- c. Science and Technology, R120 (research and development). This function is found throughout the Corps of Engineers and is both civil- and military-funded.
- d. Program Management. Corps of Engineers Program Management sub-function of the Corps of Engineers Program and Project Management function, Z101. This sub-function is found throughout the Corps of Engineers and is both civil- and military-funded.
- e. Program and Project Delivery. Functions involved in the execution of studies, projects, and programs in the Army Corps of Engineers. These functions are all unique to the Corps of Engineers, that is, they are not covered by Army-wide function codes. They include the Project Management sub-function of the Corps of Engineers Program and Project Management function, Z101, Civil Works Planning Production and Management, Q260, and Management of Construction of Real Property, Z110. With the exception of Q260, these functions and sub-functions are found throughout the Corps of Engineers and are both civil- and military-funded.
- f. Real Estate Management. Real estate management functions encompassing Real Estate and Property Acquisition, Z120, Title, Outgranting and Disposal of Real Estate/Real Property, Z135, Homeowner's Assistance Program, G080, and Employee Relocation Assistance Program, G420. These functions are found throughout the Corps of Engineers and are both civil- and military-funded.
- g. Project Operations - Civil Works. Functions included are Operation and Maintenance of Dams, Q540, Natural Resources Oversight and Management, Q240, Operation and Maintenance of Recreation Areas, Q620, Maintenance of Jetties and Breakwaters - Civil Works, Q460, Bank Stabilization, Q420, Operation and Maintenance of Hydropower Facilities, Q560, and Maintenance of Open Waterways for Navigation, Q440.

Decisions. Reference (d) exhaustively addressed the relevant issues pertaining to Water Regulatory Oversight and Management, Q260, National Mobilization and Emergency Preparedness Management, Y220, Operation and Maintenance of Locks and Bridges, Q520, and Architect-Engineering in Civil Works and Military Programs, Z145. Therefore, I am not revisiting that determination with respect to those functions.

Reference (d) also addressed Operation and Maintenance of Hydropower Facilities, Q560, and Maintenance of Open Waterways for Navigation, Q440. The determination below on operations managers augments the previous determinations on Q560 and Q440.

A separate Army-wide determination will cover management headquarters, research and development, military and civilian career progression issues for all career fields and functional areas.

For the most part, Civil Works and Corps of Engineers functions are not core war-fighting competencies of the Army, and are not inherently Governmental. The most significant exception to this determination in this decision concerns aspects of the real estate management function. A personal services exemption may apply to certain positions supervised by inherently Governmental positions covered by this decision. Congress has specifically barred divesting, transferring or privatizing Civil Works functions within the Corps of Engineers in Division D, Section 109, of the Fiscal Year 2003 Omnibus Appropriations Act. In addition, there are numerous statutory limitations affecting the contracting of Corps of Engineers functions, most of which are adequately covered by reference (d).

At the enclosure are instructions on how to implement these determinations in the Inventory of Commercial and Inherently Governmental Activities (including the Federal Activities Inventory Reform Act Inventory), to be developed by Deputy Chief of Staff (DCS), G-1 in coordination with our responsible staff officers.

Requestor's Position on Issues. In references (a), (c), (e), and (f), the requestor sought a determination that positions in certain grades and series in some functions are inherently Governmental and that all positions in other functions are inherently Governmental. The requests were limited to the issue of inherently Governmental versus commercial and did not attempt to assert that functions or positions should be exempted based on their being core to the Army's war fighting capabilities, as explicated in Army Field Manual 1, the Army Plan, and reference (b). The requestor recognized that the existence in the Army of functions not core to war-fighting requires certain non-delegable management positions (which, in turn, may implicate issues of career progression and expertise), but does not protect those positions from transfer or divestiture should the underlying, non-core functions be transferred or divested.

Standard of Review. The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war-fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are the risk factors to evaluate to consider: force management risk, operational risk, future challenges, and institutional risk. How these risk criteria are applied may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to

another agency; divestiture, and privatization). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

Core Competency Relevant to Risk Issue. The six recognized core competencies of the Army, as provided for in Army Field Manual 1 and The Army Plan, create a dilemma for the Army Civil Works program. Only its emergency operations management competency is directly related to a war-fighting competency, namely support to civil authorities. The other competencies purposefully serve Federal missions other than war fighting but are housed in the Army for good reasons, such as the suitability of the workforce for mobilization or shared expertise with Corps of Engineers Military Programs missions. Therefore, I have determined that policy-based exemptions are appropriate for those positions in the Army Corps of Engineers that are essential to the preservation of Civil Works core competencies and that are not otherwise exempted.

This determination will enable you to code the essential positions as temporarily exempted in the FY 2003 ICIGA and exclude them from the Third Wave plan for the Corps of Engineers. This determination also represents my commitment to incorporate Civil Works core competencies as a consideration in a final determination. Accordingly, the Civil Works core competencies should be precisely identified, the applicable positions and functions should be evaluated against the competencies using risk factors, and the subset of essential positions should be refined as the basis of a request for permanent exemptions in the FY 2004 ICIGA.

Statutory Requirement Relevant to Divestiture Issue. Oversight of the Civil Works program is a mandatory function of the Army and is overseen by the Assistant Secretary of the Army for Civil Works pursuant to 10 U.S. Code, Section 3016, which states: "One of the Assistant Secretaries shall be the Assistant Secretary of the Army for Civil Works. He shall have as his principal duty the overall supervision of the functions of the Department of the Army relating to programs for conservation and development of the national water resources, including flood control, navigation, shore protection, and related purposes." In addition, Division D, of the Fiscal Year 2003 Omnibus Appropriations Act precludes the use of appropriated funds to transfer, divest or privatize Civil Works functions in the Corps of Engineers. This provision does not preclude competing Civil Works functions.

Inherently Governmental Determination Relevant to Sourcing Issue. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees.

Command. The Corps of Engineers claims that "command" positions currently encumbered by uniformed military are inherently Governmental and therefore military essential. First, the issue of characterizing a function as inherently Governmental is a separate issue from characterizing a function or position as military essential. The Office of Federal Procurement Policy Letter 92-1 recognizes the command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role as inherently Governmental. Managing and supervising civilian employees and overseeing contractors, as is the case of the "command" positions in the Corps of Engineers, does not meet this criterion. Moreover, military personnel may be supervised by civilian employees. Secondly, managing a non-inherently Governmental function is not a basis for an inherently Governmental characterization. "Command" positions can be characterized as inherently Governmental when positions and functions supervised by those "Command" positions are inherently Governmental. For example, insofar as the Chiefs of Real Estate Divisions in Division and District Engineers offices have inherently Governmental powers, the "command" positions supervising them are inherently Governmental.

Nonetheless, I have determined that the Corps of Engineers Commanders and Deputy Commanders of the MACOM, the Major Subordinate Commands, and the other subordinate commands, the Chief of Staff, two Program Directors, and the Executive Directors are inherently Governmental, partly because of the functions they perform in interpreting and applying the laws of the United States to protect and advance the interests of the United States, committing or binding the United States to courses of action, or making decisions that have significant effects on life and property. In addition, most of these positions supervise inherently Governmental employees.

Management Headquarters – Civil Works. There is a separate management headquarters determination for the entire Army. Its principles will apply to the Corps of Engineers. In that decision, only very senior level positions within Army management headquarters involve the exercise of substantial discretionary decision-making or the making of value judgments in making decisions for the Government. The notion suggested by the Corps of Engineers that every position within a management headquarters is exercising inherently Governmental powers is not supported by their description of duties performed nor by existing Army determinations.

Program Management. When Congress appropriates funds for Civil Works programs and projects, the Corps of Engineers includes Program Manager functions to formulate the goals for these programs and projects. Program management activities include preparing and reviewing budget requests and justification materials; allocating funds among projects and activities; and ensuring program execution to meet program goals. The mere fact that Congress has appropriated funds for a program or project for the Corps of Engineers to manage does not necessarily make program management for that program inherently Governmental. A program can be implemented through non-Federal sources, both public and private. Private sources, as well as non-Federal public sources can direct the use of those resources to further the objectives of Congress, depending upon Congressional language and other statutes, which may

circumscribe the management of the program. According to the Office of Federal Procurement Policy Letter 92-1, budget preparation is ordinarily not inherently Governmental, whereas the determination of Federal program priorities or budget requests is inherently Governmental. The latter occurs at the level of the executive agency itself and Office of Management and Budget, where the decision-making is far less circumscribed and discretionary than at the Program Manager level within the Corps of Engineers. Although program managers within the Corp of Engineers may significantly influence the formulation and execution of budget requests and program priorities, normally providing advice or recommendations to Government officials is not inherently Governmental. There is little, if any, connection between the Program Management function, as described in the Corps of Engineers draft decision and "acting to determine, protect, and advance the economic, political, territorial, property, or other interests of the Government."

Research and Development. It is already well settled in separate Army FAIR Act-related determinations that the research and development function is not inherently Governmental. The question of converting the DoD's and Army research and development laboratories to Government-owned, contractor-operated laboratories based on the example afforded by the Department of Energy (DOE) laboratories has been considered on a number of occasions. Moreover, any exemption determination on the research and development function will be considered in a separate determination.

Project and Program Delivery. When Congress appropriates funds for Civil Works programs and projects, the Corps of Engineers includes Project Managers and Study Managers to oversee the technical, financial, legal, real estate, and other aspects of project development. Their purview is broader than that of a technical manager or the chief of a project office. They represent the Federal Government to other units of government, interest groups, and members of the public. They are involved in negotiation of agreements. They manage all aspects in the life cycle of a project. Finally, they approve work performed by contractors or government personnel; ensure adequate performance; and make recommendations to contracting officers with warrants on decisions to terminate or continue contracts or work. These Project Manager and Study Manager functions are not inherently Governmental. According to Appendix B of Office of Federal Procurement Policy Letter 92-1, the fact contractors may participate in situations where it might be assumed that they are agency employees or representatives is not ordinarily a basis for an inherently Governmental characterization. Likewise, contractors may provide assistance in contract management; provide technical evaluation of contract proposals; evaluate contractor performance; support acquisition planning; provide assistance in developing statements of work; and, participate as technical advisors to a source selection board or participate as voting or nonvoting members of a source selection board. Only awarding, terminating or administering contracts by officials with a warrant providing them such authority are inherently Governmental. Therefore, the Corps of Engineers draft decision provides little, if any, basis for claiming that Project Manager and Study Manager functions "determine, protect, and advance the government's economic,

political, territorial, property, or other interests." The mere fact that Congress appropriates monies for a project does not entail that the management of the project is inherently Governmental because it "significantly affect the life, liberty, or property of private persons." More is needed, such as the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government.

Real Estate Management. Numerous positions in the real estate field are exercising inherently Governmental functions. However, the Corps of Engineers draft recommended exemption describes the inherently Governmental aspects of real estate management in overly broad terms. For example, the Corps position includes as inherently Governmental those positions that are responsible for: committing, or deciding to commit, the Federal Government as buyer, seller, lessor, or lessee of interests in real property; entering, or deciding to enter, into real property conveyance instruments or relocation agreements; making final determinations of or approving the price, value, or payment for a property interest or the terms of acquisition or sale; making final determinations whether to extend government assistance related to property acquisition to affected persons; deciding whether to agree to settlements of claims for damages; deciding whether to defend the government's property from wrongful encroachments or trespass, or to enforce the terms of agreements that are in breach; or deciding whether and how to apply various statutes including the Uniform Relocation Act, the Federal Property and Administrative Services Act, and laws concerning homeowner assistance and employee relocation. However, the FAIR Act statute defines inherently Governmental as involving the interpretation and execution of the laws of the United States so as to exert "ultimate" control over the acquisition, use, or disposition of real property "of the United States." "Ultimate" control over the acquisition, use, or disposition of real property requires more than making "final" decisions as to parts of the process resulting in the acquisition, use, or disposition of the property. For example, final appraisal decisions are not inherently Governmental. Only the signature by a Government official having the authority to bind the Government to the real estate transaction (for example, sale, lease agreement, easement) involves the exertion of "ultimate" control over the decision making process. Based on a review of relevant delegations of authority, the Chiefs of Real Estate Divisions in Division and District Engineers offices have this authority. Similarly, only the decision in the Department of Justice to defend the Government's interest against trespassers is inherently Governmental, not any "final" recommendation within the Corps of Engineers. Clearly, the exercise of the Government's eminent domain powers is among the most inherently Governmental of the functions performed by the Corps of Engineers. However, recommendations and advice impacting the exercise of the eminent domain power, is not inherently Governmental. Review of the relevant delegations of authority from the Secretary of the Army to the Corps of Engineers indicates that authority to execute requests for condemnation and declarations of taking are limited to properties with an estimated fair market value of \$350,000 or less and delegated to the Chief of Engineers and his or her Director of Real Estate.

Operations Management. Congress has appropriated funds to the Corps of Engineers to perform various projects that include: the coastal harbors, systems of flood control and multipurpose reservoirs, and the flood control features on the Mississippi River. (Non-Federal interests operate other projects after construction, and lock masters on the inland waterways were addressed in reference (e).) The Corps of Engineers argues that Operations Managers are inherently Governmental because they make decisions that, in some circumstances, commit the government to an irrevocable course of action where lives, livelihoods, and the safety of property are at stake. However, most of these decisions, as described by the Corps, involve technical functions rather than the making of value judgments in interpreting and executing the laws of the United States. There are private actors or non-Federal Governmental entities which exercise similar technical judgments and decisions having broad and significant public impacts. The mere fact that Congress has appropriated funds for a project or program, or the fact that an activity has an impact on the public, is not a sufficient basis for an inherently Governmental characterization. Examples of such Operations Managers functions include:

Operation and Maintenance of Dams, Q540. This function includes operation and maintenance of levees. The Water Operations Managers make decisions regarding water storage behind the dam, the volume, velocity, and timing of water releases from the dam, and control of flood flows (such as decisions to open spillways, control structures, and levee closures to pass flood flows). During a flood, the Water Operations Manager must trade off the risks from increasing releases from a dam or detonating a levee closure, with the risks of greater losses in the near term if he or she does not authorize the action. Dam or levee failure or sudden, deadly flows are possible consequences.

Operation and Maintenance of Hydropower Facilities, Q560. The hydropower facilities at Corps dams are part of nation-wide electric grid. The Water Operations Manager and the Hydropower Manager make decisions on water releases that generate power to honor contractual commitments and meet peaking power needs without significantly affecting other project purposes. Decisions such as when to take facilities out of operation have significant effects on the public welfare.

Maintenance of Jetties and Breakwaters – Civil Works, Q460. The Operations Managers for a Civil Works project make decisions of when to dredge, or not to dredge, in a way that complies with various State and Federal environmental laws, including laws within the jurisdiction of the Corps of Engineers. The impacts on endangered species and the navigable harbors of the United States can be substantially impacted by these decisions.

Bank Stabilization, Q420. The government's concrete mattress-placing unit that is used to protect the federal levees on the main stem of the Mississippi River is the only equipment of its kind in the Nation and is used exclusively for construction and operation of the Federally-operated Flood Control, Mississippi River and Tributaries (MR&T) project. The unit is a "natural monopoly" because the owner of the unit would be able to price its services so as to preclude competition by other prospective market

entrants. Presumably, it is more cost-effective for the Federal Government to own this plant than to rely on the services of a monopoly contractor. The Operations Managers of this equipment have special expertise needed to advance the government's interests and to ensure the protection of lives and property behind the main line levees on the Mississippi. In addition, they exercise ownership functions through their control of the use of this equipment.

The existence of a "natural monopoly", the need for special expertise to advance the Government's interests, and cost-effectiveness are not relevant to an inherently Governmental characterization.

There are, however, other functions which Operations Managers implement which at some level within the Corps of Engineers involve inherently Governmental decisions, but these are not necessarily at the level of the Operations Manager. For example, in the Natural Resources Oversight and Management function, Q240, some managers issue permits authorizing certain uses of waters and lands under their oversight. The decision as to whether a person meets the criteria required for a permit is ministerial in nature, and is highly circumscribed by guidelines prepared within the Corps of Engineers. The person approving the guidelines used by Operations Managers in making particular permit decisions is inherently Governmental, because formulating the guidelines for issuing permits on the use of Federal lands or water ways involves substantial discretionary decision making or the making of value judgments in the application of Federal Government authority.

In Title 33, U.S. Code, Sections 1 and 413, Congress has assigned to the Secretary of the Army the duty to prescribe regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement. Officials who approve the procedures for the operations of the interstate navigable waters are the only officials within the Operations Management function who are executing the laws of the United States so as to significantly impact the life, liberty, and property of private persons.

Finally, within the Operation and Maintenance of Recreation Areas function, Q620, there are Park Rangers who are authorized to patrol, issue citations, and appear before Federal Magistrates in formal hearings. The FAIR Statute defines an inherently Governmental function as involving the interpretation and execution of the laws of the United States so as to determine, protect, and advance United States interests by civil or criminal judicial proceedings; or to significantly affect the life, liberty, or property of private persons. According to Appendix A, Office of Federal Procurement Policy 92-1, the direct conduct of criminal investigations, the control of prosecutions, and performance of adjudicatory functions are inherently Governmental. Appearing as a witness in Federal Court is not inherently Governmental. Unless park rangers have arrest and detention powers, the mere issuance of a citation is normally not inherently Governmental. Contract security guards on Army installations issue traffic citations and appear as witnesses in Federal Court.

Statutory Requirements Relevant to Sourcing Decision. Title 10 U.S. Code, Section 3036 states that the Chief of Engineers "shall be appointed by the President." Title 10 U.S. Code, Section 3039 provides for "two assistants to the Chief of Engineers appointed as prescribed in section 3036." In addition, Title 33 USC § 642 and 644 require that three Commissioners and the Secretary of the Mississippi River Commission be appointed from among officers of the Army Corps of Engineers, Title 22 USC § 267b requires that one Commissioner of the International Joint Commission be appointed from among officers of the Army Corps of Engineers, and Public Law 105-18, § 3001(a), requires that the members and alternate members of the Delaware River Basin Compact Commission and the Susquehanna River Basin Compact Commission be appointed from among officers of the Army Corps of Engineers. Division D of the Fiscal Year 2003 Omnibus Appropriations Act precludes the use of appropriated funds to transfer, divest or privatize Civil Works functions in the Corps of Engineers. This provision does not preclude competing Civil Works functions. Prior exemption determinations (reference d) clarified that cost competition for Architects-Engineers following OMB Circular A-76 procedures would conflict with the procedures specified in the Brooks Act (Title 40, United States Code, sections 541-544). In addition, the preparation of designs, plans, drawings, and specifications cannot be contracted in accordance with OMB Circular A-76 procedures pursuant to Title 10, United States Code, Section 4540. Title 33, United States Code, Sections 622 through 624 directs that the Government dredge fleet maintained by the Corps of Engineers be limited and authorizes contracting the function out even if the contractor's price is up to 25 percent higher than the Government estimate. Apart from the above provisions, Corps of Engineers functions are subject to the normal process provided by section 2461, title 10 and section 8014 of appropriations acts (for military-funded functions) mandating public-private competition in certain circumstances, subject to the standard exceptions for 10 or fewer civilian employees, and preferential procurement programs.

Personal Services. Where supervision by an inherently Governmental official is required for effective performance of an activity in support of that official, there is a basis for exempting that activity, whether advisory or clerical support, to avoid an inappropriate personal services contract. In addition, if persons supervised by an official in turn must supervise individuals supporting them in order to effectively perform the activity, a further extension of this exemption may be warranted.

Conflicts of Interest. For a number of functions, the interests of a private party or non-Federal unit of government would be in conflict with those of the government if the function were privatized or if certain positions in the function were performed by contractors. These functions include construction management, project management, Civil Works planning management, and operations management, as discussed below.

Ordinarily, controls can be built into the administration of contracts to protect against conflicts of interest. However, where a contractor is serving as construction manager and in turn oversees contracted construction work, the overseeing contractor may have incentives or interests that unavoidably are at odds with those of the

government. At a minimum, the contractor would not be an effective advocate for the government's economic, financial, legal, or other interests. The positions with duties as construction managers with oversight responsibilities must be government employees to prevent such conflicts and protect the government's interests. Therefore, as a matter of policy, these positions are exempt.

The positions of project manager and Civil Works study manager act as representatives of the government to other units of government and non-Federal interests and, in the latter case, apply Federal laws and policies to determine the Federal interest in water resources development. A contractor cannot represent the Federal government or identify the Federal interest, although a contractor may advise the positions charged with doing so. If placed in the position of project manager or planning manager, the contractor would find its actions motivated by its own interests, not those of the government. The positions with duties as project manager or Civil Works study manager must be government employees to prevent such conflicts and ensure impartiality. Accordingly, as a matter of policy, these positions are exempt.

Most completed Civil Works projects are owned and operated by non-Federal interests. However, certain projects and systems have one or more key public interest characteristics or involve non-delegable Federal functions. These non-delegable functions include controlling interstate commerce, as is the case for the inland waterway transportation system; managing water uses in multi-state river basins, as is the case for the reservoir systems on the Missouri River, the Columbia River, and elsewhere; and preventing widespread destruction of property or loss of life, as is the case for the flood control levee system on the lower Mississippi River. A private operator of a waterway, levee, or reservoir system would seek to maximize profit, perhaps at the expense of efficient and safe navigation or the safety of life. Likewise, a non-Federal public operator would make decisions that sacrifice the interests of the citizens in one state or locality for the interests of citizens in another. In recognition of these conflicts with the public interest, the laws creating these projects and systems have mandated ownership and operation by the Corps of Engineers. For these same reasons, the senior manager positions that are charged with managing and overseeing system operations must be government employees. Therefore, as a matter of policy, these positions are exempt.

Military Conversions. Although the Corps of Engineers performs very important functions, with the exception of emergency operations management, most are not directly connected to the Army's core war fighting competencies. However, the military officer positions established in law (10 USC § 3036 and 3039, 33 USC § 642 and 644, 22 USC § 267b, and Public Law 105-18 § 3001(a)) may not be converted to civilians. Aside from the need for military career progression (to be addressed in a separate Army-wide determination), there does not appear to be a compelling basis for military performance of the remainder of functions currently performed by military in the Corps.

To the extent that Corps of Engineers personnel carry out their duties in the infrastructure rather than in the actual area of engagement for military forces, these functions can be carried out by civilians. The DoD Inventory of Commercial and Inherently Governmental Activities Guide to Inventory Submission (Inventory Guide), Enclosure 6, page 6-3 provides guidance regarding manpower mix criteria. In particular, the guidance for using military as opposed to civilian employees or contractors, even in battlefield situations, turns on the need for Uniform Code of Military Justice (UCMJ) authority to compel adequate performance. Management of civilian employees in Engineer District Offices, and oversight of contractors, does not require UCMJ authority. As stated previously, an inherently Governmental characterization of the command function is not a basis to mandate military performance of that function.

Outside of military theater operational areas the central issue concerns whether adequate performance of Corps of Engineers functions in the infrastructure requires military unique knowledge and skills. According to Office of Secretary of Defense Guidance for compiling the Inventory of Commercial and Inherently Governmental Activities, military unique knowledge and experience can only be derived from *recent* first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences. Nothing in the record establishes that this criterion has been met.

Army Regulations that are inconsistent with this guidance, unless they are grounded in statutes not currently identified, can be changed.

Reference (e) included a request that the uniformed military positions in the Corps of Engineers remain so. It is my understanding that this request has been withdrawn until the effects of Army-wide decisions on military career progression can be evaluated.



Reginald J. Brown
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosures

CODING RULES FOR CORPS OF ENGINEERS

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| 1. USACE, Director of Real Estate (W1B7AA) | Code E – Civilian Authority Direction & Control |
| 2. Chiefs of Real Estate Divisions in Division and District Engineers Offices and the Command positions (including Deputy Commanders) supervising them at the following locations: | Code L – Protected by law, statute, treaty or agreement |
| 3. USACE Chief of Staff, Director of Military Programs, Director of Civil Works, and Executive Directors in Division and District Offices | Code M – Restricted by DoD Management Decision |
| 4. Positions that approve guidelines for use permits at Federal projects and procedures for operation of navigable waters | Code E – Civilian Authority, Direction, and Control |
| 5. Positions that serve as construction managers overseeing contracted construction work, project managers, Civil Works study managers, and senior operations managers overseeing waterway, flood control, and multi-purpose management systems | Code M -- Restricted by DoD Management Decision |
| 6. Positions essential to Civil Works core competencies | Code M -- Restricted by DoD Management Decision (temporary) |

Previous exemptions for USACE remain in effect. This decision appends to earlier decisions.

USACE civil-funded and military-funded functions will be impacted by other, Army-wide exemption decisions. Those positions not so exempted will be coded by USACE pursuant to the previous USACE exemptions and the above coding rules.

Coding of all USACE positions pursuant to previous exemptions for USACE, the above coding rules, and Army-wide determinations is expected to be distributed approximately as follows:

- a. 11% Governmental in nature – exempt from competition
- b. 5% Exempt by DoD Management Decision (conflict of interest – para. 5)
- c. 19% Candidates for alternatives to A-76 (Architect-and-Engineering functions and vessel operators of minimum fleet)
- d. 14% Exempt by DoD Management Decision (Civil Works core competencies – para. 6) (temporary)
- e. 51% Subject to review for conversion or competition.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
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111 ARMY PENTAGON
WASHINGTON, DC 20310-0111

January 25, 2002



REPLY TO
ATTENTION OF

INHERENTLY GOVERNMENTAL AND EXEMPTION DECISION 2002-0001

MEMORANDUM THRU ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

FOR CHIEF, U. S. ARMY CORPS OF ENGINEERS

SUBJECT: Determination of Inherently Governmental Activities and of Commercial Activities Exempted from Private Sector Performance

Reference:

a. Memorandum, COE, CERM-M, 23 Oct 2000, subject: Request for Exemption of Select Civil Works Functions.

b. Memorandum, ASA(CW), 19 Jan 2001, subject: Commercial Activities.

I have determined that the lockmaster function at locks and dams; the regulatory functions involved in permit issuance, prescribing regulations, and enforcing permit conditions; emergency operations management functions; and the operation and minor maintenance of hydropower facilities being performed in-house as of November 28, 1990, are inherently Governmental functions. In addition, I have determined that the operation of the dredge fleet and the architect-engineer (A-E) functions performed by the Corps of Engineers are commercial functions that are exempt from the competition process under Office of Management and Budget Circular (OMB) A-76. Although the exempt activities are not to be competed under Circular A-76, there is no legal impediment to consolidating, downsizing, or independently increasing the level of A-E contracting by means other than OMB Circular A-76. The criteria for identifying the functions affected by these decisions are identified at enclosure.

An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. An example of substantial discretion involves actions that significantly affect the life, liberty, or property of private persons. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees.

In Title 33, United States Code, sections 1 and 413, Congress has assigned to the Secretary of the Army the duty to prescribe regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of



the United States in channel improvement. This is the statutory basis for the lock master function, among others. Lockmasters perform an inherently Governmental function because they make locking decisions and direct lock traffic, thereby significantly affecting the life, liberty and property of private persons.

The Corps of Engineers is authorized, pursuant to sections 9, 10, and 13 of the Rivers and Harbors Act of 1899, section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, and section 404 of the Clean Water Act, to issue permits, prescribe regulations, and enforce permit conditions. Accordingly, the regulatory decisions of the Corps of Engineers are inherently Governmental because they involve the exercise of substantial discretionary decision-making authority and significantly affect the life, liberty and property of private persons. This determination does not extend to data collection, wetland delineation, or report-writing functions that do not involve the exercise of substantial discretion in decisions affecting private life, liberty, or property.

The Corps of Engineers emergency operations management function includes preparedness, response, and recovery from floods, coastal storms, and water supply emergencies under the flood control and coastal emergencies authority as provided for under Title 33, United States Code, section 701n; activities in support of the Federal Emergency Management Agency upon a Presidential declaration of emergency pursuant to the Stafford Act; catastrophic earthquake preparedness; oil and hazardous-material spills planning and response as provided for under the Clean Water Act; and international disaster support in accordance with Title 22, United States Code, section 2292. The emergency operations management functions performed by the Corps of Engineers are inherently Governmental functions because they significantly impact the life, liberty and property of private persons. These management functions include planning; mobilization; command, communication, and control; and award, supervision and administration of contracts.

Operation and minor maintenance of hydropower facilities performed in-house as of November 28, 1990, are inherently Governmental functions because they are specified as such in section 314 of the Water Resources Development Act of 1990, Public Law 101-640 (Title 33, United States Code, section 2321). In section 314, Congress has specifically determined that those operation and minor maintenance activities at hydropower facilities that were undertaken by Civil Works personnel as of the date of enactment of the Act are inherently Governmental. Major maintenance of hydropower facilities and those minor operation and maintenance activities that were not undertaken by Civil Works personnel as of the enactment date are not necessarily inherently Governmental under the Act.

Cost competition for A-Es following OMB Circular A-76 procedures would conflict with the procedures specified in the Brooks Act (Title 40, United States Code, sections 541-544). Whereas OMB Circular A-76 requires that performance of an entire "activity" be competed between the Government and potential contractors, the Brooks Act

requires selection of an A-E contractor for each "proposed project" based on publicly announced, project-specific selection criteria. While OMB Circular A-76 requires selection based on a cost competition, the Brooks Act prohibits the consideration of cost information in the selection of a contractor. Contractors are selected only on qualifications and at no time are comparative prices considered. The agency head is to take into account the estimated value of the services to be rendered, as well as the scope, complexity and professional nature of the services. A fair and reasonable price is to be negotiated with the highest qualified firm, or, in the event of failure to agree, with the next-most qualified firm with which agreement can be reached. Consequently, cost competition using OMB Circular A-76 procedures would violate the selection procedures specified in the Brooks Act.

For a subset of A-E services, namely the preparation of designs, plans, drawings, and specifications, Title 10, United States Code section 4540, bars contracting in accordance with the provisions of OMB Circular A-76. Section 4540 authorizes contracting for those specific A-E services only if existing Corps resources ("facilities") are inadequate to perform the work. Therefore, the Corps may contract for A-E services only to supplement existing resources and may not issue a solicitation for contractor services to replace current in-house employees. OMB Circular A-76, however, requires a competitive cost comparison between performance of work by the existing in-house staff and by contract, with the potential result of replacing current employees.

As early as 1978, in Title 33, United States Code, sections 622 through 624, Congress expressed the objective of reducing the Federally owned fleet needed for improving the rivers and harbors and created a statutory mechanism to encourage private sector rather than Governmental performance of dredging. In order to facilitate an orderly transition to private industry performance, Section 622 authorized the Secretary to retain a minimum dredge fleet to carry out emergency and national defense work. Section 624 provides that the Secretary shall have dredging and related work done by contract if he determines private industry has the capability to do such work and it can be done at reasonable prices. Section 624 established a statutory standard that a contract may be awarded even if the contractor's price is up to 25 percent higher than the Government estimate. Read in context, since Congress has directed that the Government fleet be limited and has enacted a statutory mechanism to authorize contracting out, the minimum dredge fleet function is a commercial function that is exempt from compliance with the A-76 process. It should be noted that the Corps currently contracts out 89 percent of its dredging.



Reginald J. Brown
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

U.S. ARMY CORPS OF ENGINEERS – CIGA CODING APPLICATION

Army Coding Rules Application

Applied “Criteria for the Commercial Activities Reason Codes (CARC) Order of Application of Reason Codes” rules to:

- (1) all Army common functions and occupations
- (2) occupational series in USACE specific functions to which the Army coding rules apply (for example: Attorneys, Secretaries).

Applied CARC “X – Competeable But Exempt From A-76” in accordance with OMB Circular No. A-76 paragraph 7.c. to all scientific and technical authorizations in CAFCs:
R110: Management Headquarters – Research & Development
R120: Science & Technology
R140: Management and Support to R&D

USACE Specific Coding Rules Application

<u>CAFC</u>	<u>Exemption</u>
Q220	Occupational Series: 00020, 00023, 00028, 00110, 00150, 00193, 00301, 00340, all 400, all 800, all 1300 Branch: ES, GS, GM G: Grades 14, 15, 00 H: Grades 12, 13
Q260	Occupational Series: 00020, 00023, 00028, all 100, 00340, all 400, all 800, all 01100, all 01300 Branch: ES, GS, GM G: Grades 14, 15, 00 H: Grade 13
Q440	Occupations and grades in the Minimum Dredge Fleet X: Branch WJ, Grades 01-16, Occupational Series 04742, 05784, 07404
Q520	Occupational series: 05426 G: 200 Wage Graded positions
Q560	G: All wage series grades
Z145	Occupational series: 00020, 00023, 00028, all 100, 00301, all 400, all 800, all 1300 Branch: ES, GS, GM G: Grades 14, 15, 00 H: Grade 13 X: < Grade 13
Y220	H: All positions

CODING RULES FOR CORPS OF ENGINEERS

- | | |
|---|---|
| 1. USACE, Director of Real Estate (W1B7AA) | Code E – Civilian Authority Direction & Control |
| 2. Chiefs of Real Estate Divisions in Division and District Engineers Offices and the Command positions (including Deputy Commanders) supervising | Code L – Protected by law, statute, treaty or agreement |
| 3. USACE Chief of Staff, Director of Military Programs, Director of Civil Works, and Executive Directors in Division and District Offices | Code M – Restricted by DoD Management Decision |
| 4. Positions that approve guidelines for use permits at Federal projects and procedures for operation of navigable waters | Code E – Civilian Authority, Direction, and Control |
| 5. Positions that serve as construction managers overseeing contracted construction work, project managers, Civil Works study managers, and senior operations managers overseeing waterway, flood control, and multi-purpose management systems | Code M -- Restricted by DoD Management Decision |
| 6. Positions essential to Civil Works core competencies | Code M -- Restricted by DoD Management Decision (temporary) |

Previous exemptions for USACE remain in effect. This decision appends to earlier decisions.

USACE civil-funded and military-funded functions will be impacted by other, Army-wide exemption decisions. Those positions not so exempted will be coded by USACE pursuant to the previous USACE exemptions and the above coding rules.

Coding of all USACE positions pursuant to previous exemptions for USACE, the above coding rules, and Army-wide determinations is expected to be distributed approximately as follows:

- a. 11% Governmental in nature – exempt from competition
- b. 5% Exempt by DoD Management Decision (conflict of interest – para. 5)
- c. 19% Candidates for alternatives to A-76 (Architect-and-Engineering functions and vessel operators of minimum fleet)
- d. 14% Exempt by DoD Management Decision (Civil Works core competencies – para. 6) (temporary)
- e. 51% Subject to review for conversion or competition.